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In the Supreme Court of the United States

OCTOBER TERM, 1935.

NO. 335

GEORGE NOBLE and WILLIAM NOBLE,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY,
a Municipal Corporation,
Respondent.

NO. 336

ROBERT W. HIGGINS, JR., JOHN T. HIGGINS,
RALEIGH E. HIGGINS ET AL.,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY,
a Municipal Corporation,
Respondent.

REPLY BRIEF OF PETITIONERS TO SUPPLEMENTAL BRIEF OF RESPONDENT.

JOE T. ROGERS,
HENRY L. GODDARD,
WARREN E. LIBBY,
R. L. DISNEY,
FRED E. SUITS,
FRED PTAK,
CHAS. H. GARNETT,

Counsel for Petitioners.

INDEX

PAGE

"Was the Act of Congress termed the Choctaw Railway Act, as amended, a grant in praesenti of the right-of-way to the railway company?" 1

"Even if the Indians owned the fee title to the land to be traversed by the proposed railway at the time the Acts of Congress were enacted, still Congress could grant a railroad right-of-way in praesenti across the same." 4

"Because the Choctaw Railway Act provided for payment by the railway of compensation to the Indians, Congress did not intend for the railway company to pay compensation to anyone else." 7

"Additional reasons for denying relief in the Higgins case because of the state question involved." 9

"This court ought, in event the Higgins case is reversed, to order and direct that the trial court enter judgment for the petitioners." 11

"The Land Office Decision in Abilene Oil Company v. Choctaw, Oklahoma & Gulf Railroad Company." 12

"Whatever title the railway company may have acquired under the Choctaw Railway Act and by whatever method the same may have been acquired, it took only an easement or limited fee for railroad purposes in the surface, with the underlying fee or revisionary right in the Indian Tribe or in the United States, and this fee or right passed by patent from the United States and by mesne conveyances to petitioners' ancestors." (Original Brief, page 58.) 17

Conclusion 19

Appendix 21

Authorities Cited

PAGE

Barker v. Lashbrook, 128 Kan. 595, 279 Pac. 12 18
Butts v. Northern Pac. R. R. Co., 119 U. S. 55 6

Cherokee Nation v. Southern Kansas Ry. Co., 33 Fed. 900, 135 U. S. 641 .....3, 12
Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641 12
City of Reno v. Southern Pac. Co., 268 Fed. 751 8

Marland v. Gillespie, 168 Okla. 376, 33 Pac. (2d) 207.. 10

Oklahoma City v. Dobbins, 172 Okla. 194, 44 Pac. (2d) 148 10
Opinion of Assistant Attorney General Van Devanter, reported in 27 Land Office Decisions 414 12

Paine v. Consumers F. & S. Co., 71 Fed. 626 18

Rio Bravo Oil Co. v. Weed, — Tex. —, 50 S. W. (2d) 1080 18
Roxana Pet. Corp. v. Jarvis, 127 Kan. 365, 273 Pac. 661 18
Roxana Pet. Corp. v. Sutter, 28 Fed. (2nd) 159 18

Shell Pet. Corp. v. Hollow (10 C. C. A.), 70 Fed. (2d) 811 18
Spokane & British Ry. Co. v. Washington & Great Northern Ry. Co., 219 U. S. 166 5

United States v. Fort Smith & Western Ry. Co., 195 Fed. 211 (8 C. C. A.) 3, 12

W. S. Burch, 45 L. D. 473 16

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REPLY BRIEF OF PETITIONERS TO SUPPLEMENTAL BRIEF OF RESPONDENT.

Respondent having served petitioners' counsel with a supplemental brief, they deem it desirable to file a reply thereto.

At pages 2 to 8, inclusive, of this supplemental brief the following question is considered:

Was the Act of Congress termed the Choctaw Railway Act, as amended, a grant in praesenti of the right-of-way to the railway company?

In respondent's discussion of this question it is as-

sumed that petitioners' contention that the Act did not grant a right-of-way *in praesenti* is based solely on the proposition that the land to be traversed by the railway was land owned in fee by the Indians and hence Congress was *without power* to grant title to a right-of-way across it. No other argument is made in the pages of respondent's supplemental brief referred to.

In this respondent wholly misinterprets and misrepresents petitioners' contention. Their contention is that the Act of Congress does not by its very langauge purport or pretend to grant title to a right-of-way at all, but on the contrary purports to and does merely grant a franchise to construct a railway and the power of eminent domain to condemn and acquire a right-of-way therefor and that this interpretation of the Act is not only apparent from the language used, but has been the settled congressional, executive and judicial interpretation of it from the time the bill was introduced in Congress down to date. This contention is made plain, and is fully supported by authorities presented in petitioners' original brief.

But petitioners have urged and still urge, that since the original Act authorized a railway through Choctaw and Chickasaw country, the title to which was owned by these Tribes in fee, the interpretation of the Act as a present grant of title was not permissible because beyond the power of Congress. This is urged in support of the construction of the Act contended for by them, and not as a ground to defeat the provisions of the Act itself. In other words, it is not petitioners' position, as respondent represents it to be,

that the Act by appropriate language granted a right-of-way *in praesenti* but that the effect of such language was defeated by lack of constitutional power in Congress to make such a grant. Consequently respondent's argument that *Congress had the power to grant* a right-of-way *in praesenti* across the lands in question, even if correct, which petitioners deny, goes merely to the question of *the power of Congress* and not to the question of what Congress actually did and provided by the very language of the Act itself.

We deem it settled by the case of *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, that Congress was without power to grant a railroad right-of-way *in praesenti* through the lands of the Cherokee Nation, and hence also through the lands of any other of the Five Civilized Tribes who held the same sort of fee title to their lands as the Cherokees, and that being without power to make such grant, the original Act would be void if it purported to do so, because the line of road there authorized was wholly across lands of the Choctaw and Chickasaw Tribes to which they held a fee title, and the amendment to the Act would likewise be void in respect to at least that part of the line of road which traversed the eastern half of the domain of the Creek Tribe. It was and is urged by petitioners that this fact is a powerful argument, even though it be not needed, to support the interpretation of the Act contended for by them, and as announced in *United States* v. *Fort Smith & Western Ry. Co.*, 195 Fed. 211 (8th C. C. A.), and in the opinion of the Attorney General in 27 Land Office Decisions 417.

The United States had a restricted title to the western half of the Creek domain until March 1, 1889. This territory had been ceded to it by the Treaty of Washington, June 14, 1866, 14 Stat. 785, for the purpose of settling other Civilized Indians therein. By the Treaty of January 19, 1889, 25 Stat. 757, it paid the Indians a consideration of over $2,000,000 for a further cession of the same territory "entirely freed from any limitation in respect to the use and enjoyment thereof."

It is certain that the United States did not have absolute ownership of this domain, and that the Indians did have some title and interest therein, prior to March 1, 1889. This was the condition existing at the time of the Amendment of February 13, 1889, to the Choctaw Railway Act.

Therefore, petitioners say that respondent's supplemental brief is without weight as an answer to their contention that the Choctaw Railway Act was not a grant *in praesenti*.

At pages 8 to 10 of respondent's supplemental brief, the following proposition is urged:

Even if the Indians owned the fee title to the land to be traversed by the proposed railway at the time the Acts of Congress were enacted, still Congress could grant a railroad right-of-way in praesenti across the same.

Petitioners say that this proposition is effectively negatived by the authorities cited in their original brief and under the preceding proposition herein.

In support of it respondent cites *Spokane & British Ry.*

Co. v. *Washington & Great Northern Ry. Co.*, 219 U. S. 166. An examination of the case shows that no question presented in the instant cases is there considered or even raised. The Act of Congress there under consideration purported to grant a right-of-way *in praesenti*. The language is:

> "That there is hereby granted to the Washington Improvement & Development Company, a corporation, organized and existing under the laws of the State of Washington, and to its assigns, a right-of-way for its railway, telegraph and telephone lines through the Colville Indian Reservation in the State of Washington."

Section 2 of the Act provided that the Secretary of the Interior should fix the compensation to be paid the Indian allottees. There is nothing in the decision to show, and counsel for petitioners do not know, what sort of right or title the Indian Tribe or the Indian allottees had in this land. But the question of whether Congress had the power to grant a right-of-way *in praesenti* across allotted Indian land is not decided, considered or raised in that case. It might very well be that if an Indian allottee had asserted that Congress was without power to grant a right-of-way across his allotment for a compensation to be fixed by the Secretary of the Interior, this Court would have upheld his assertion.

The controversy in the reported case was between two railroad companies over a claimed right-of-way through the Indian Reservation, and the only question decided or considered was whether the grantee of the right-of-way under the Act of Congress had forfeited it by non-performance of the conditions of the grant. The Supreme Court of Wash-

ington held that it had not done so, and the Supreme Court of the United States held that whether it had or had not was a question that no one could raise but the United States, and that whether the granted right-of-way had been abandoned and forfeited was a State question and not a Federal one, and would not be reviewed by the United States Court. So there is nothing in that case that remotely touches any question in the instant cases.

Another case cited by respondent is *Butts* v. *Northern Pac. R. R. Co.*, 119 U. S. 55. That case involved an Act of Congress granting lands, not for a right-of-way, but in aid of the construction of the Northern Pacific R. R. Company. It is in terms of a present grant: "That there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph lines, etc.," ten alternate sections of land per mile on each side of said railroad of the public lands of the United States not otherwise appropriated and free from preëmption or other claims or rights. At the time of the enactment of the law part of the lands granted were occupied by certain Indians and the second section of the Act provided that the United States would extinguish as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands "falling under the operation of this Act, and acquired in the donation to the road."

It also appears that the Indians did not have a fee title to the lands, but only a mere right of occupancy. In the opinion the court said, referring to the Indian occupancy:

"But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the land subject to the dominion and control of the Government. The grant conveyed the fee subject to this right of occupancy."

The Act of Congress having expressly so provided, certainly the railroad company took a fee title to the lands granted in aid of construction of its road, subject to the Indian right of occupancy, which encumbrance the United States undertook to extinguish and remove for the benefit of its donation to the railroad company.

There is nothing in this case that can throw any light on the issues in the instant case.

At pages 10 to 16 of respondent's brief, the proposition is urged that:

"Because the Choctaw Railway Act provided for payment by the railway of compensation to the Indians, Congress did not intend for the railway company to pay compensation to anyone else."

This proposition is, of course, absolutely true in respect of Indian Country, for no one but Indians had any right therein to be compensated. As pointed out in the Attorney General's opinion by Mr. Justice VAN DEVANTER, by its provisions the Act was applicable to and workable only in Indian Country, and when any land ceased to be tribal land and came under private ownership, its provisions had no application. This is also the position taken in President HARRISON's Veto Message.

Admittedly if the Act had purported to grant a right-of-way *in praesenti* through public domain, no settler on any public land after its enactment would have a right superior to the railway company's right-of-way. This petitioners have at all times freely conceded.

But since the Act did not grant a right-of-way *in praesenti,* then the railway company could acquire one through the public domain only by compliance with the provisions of the general statute of March 3, 1875, 18 Stats. 482. And if it sought a right-of-way under that statute, all rights of settlers arising prior to the filing of its map of definite location were superior to its right.

In support of its contention, the respondent cites *City of Reno* v. *Southern Pac. Co.,* 268 Fed. 751. That case involved an Act of Congress granting a railroad right-of-way *in praesenti* through the public land. The court held, in accordance with all the authorities, that a settler on unsurveyed public land which was not subject to preëmption or homestead, acquired no right thereto against the United States, and that the United States could, and by the Act in question did, grant the railway company a title vesting *in praesenti* to a right-of-way through such land, and that such title was superior to that of a mere squatter thereon. The facts of the instant cases are so wholly different that that case can not by any sort of reasoning be tortured into a precedent for respondent's contention.

In respect of the *Higgins* case, the respondent, at pages 16 to 19 of its supplemental brief, sets out:

"Additional reasons for denying relief in the Higgins case because of the state question involved."

On this counsel refer to what they term "technical objections" to respondent's pleadings raised for the first time by petitioners in their reply brief in this Court. An examination of that brief shows that no technical objections, and no objections of any sort, were there raised to the pleadings, and none are raised now. The point made there, and again made here, is that respondent's pleading in the trial court, which was entirely proper as a defense and of which no criticism is made, absolutely negatives the contention which it now makes in respect of the Higgins deed.

The respondent pleaded that the deed of the Higgins ancestor never conveyed any title to the land involved in that case to the railway company. The trial court made a general finding in favor of the defendant, which is a finding in support of this defense pleaded by respondent.

Petitioners say that respondent is attempting to raise in this Court a question not urged in either of the courts below and which constitutes a complete reversal of its pleadings and of its position in them.

Petitioners say further, as pointed out in their reply brief, that the Supreme Court of Oklahoma held in direct and unequivocal language that the Higgins deed conveyed no title to the railroad company and that when it abandoned the right-of-way, its title thereto was extinguished and the

land reverted either to the petitioners claiming under the patent of the United States to Higgins, or to the respondent, the City of Oklahoma City. The case was presented and was decided squarely on the question of to whom the reverter went, and not upon any contention that the railroad company acquired a fee title to the right-of-way by the Higgins deed and conveyed this title to the respondent by its deed.

Respondent says further that the record shows, and that petitioners know, that the contention was made in both the Oklahoma Courts that the deed executed by Higgins and his wife to the railway company conveyed the absolute fee. We flatly deny the correctness of this statement and say that respondent's counsel are mistaken.

On the contrary, in the trial of the case, in which none of present counsel for respondent participated, or were present, the then counsel for respondent stated in open court in argument that it placed no reliance for its title on the deeds from Higgins to the railway company, and from the railway company to it. And this position taken by the respondent in the Supreme Court of Oklahoma led that Court to say in its opinion:

> "It is conceded that upon abandonment by the railroad company its title terminated." (R. 210.)

As pointed out in petitioners' reply brief, there is nothing in the cases of *Marland* v. *Gillespie,* 168 Okla. 376, 33 Pac. (2d) 207, and *Oklahoma City* v. *Dobbins,* 172 Okla. 194, 44 Pac. (2d) 148, that can even remotely support the belated contention of respondent made here for the first

time that the Higgins deed to the railroad company conveyed a fee simple title.

On this subject petitioners submit the following proposition:

> **"This court ought, in event the Higgins case is reversed, to order and direct that the trial court enter judgment for the petitioners."**

It is evident from respondent's supplemental brief that counsel expect upon reversal of the Higgins case to be able to change the theory on which it was tried, submitted and decided in both the lower courts, and by raising new issues and taking a new position, to retry it, hoping to win it on a theory and issues wholly different from those on which it has thus far been presented, and, whether successful or not, to drag the petitioners through another weary five years in the lower courts before a final judgment is obtained.

Petitioners say that respondent should by this Court be held to the record as made and to its theory of the case in both the lower courts, and if by reversal of those courts, it loses on that theory, then this Court should order and direct the trial court to enter judgment for the petitioners and not permit respondent, after having lost its case on one theory, to change front, amend its hold, and try it on another. If this were permitted once, it might be repeated indefinitely. This is the very sort of procedure for which respondent in its brief is seeking to lay the foundation. Petitioners feel strongly on this point and most respectfully urge it upon the consideration of the Court. Surely, since

the only questions now in the cases are federal questions on which the decision of this Court will be final, it should order and direct by its mandate, in event of reversal of the lower courts, the entry of a judgment for petitioners.

"The Land Office Decision in Abilene Oil Company vs. Choctaw, Oklahoma & Gulf Railroad Company."

There is nothing in this land office decision cited by respondent, and copied in full as an appendix to its supplemental brief, that could aid in a decision of the instant cases. There is in it a statement to the effect that the Choctaw Railway Act was a grant of title *in praesenti,* and this statement is based on some of the same cases, or cases of the same character, as those cited and relied on by the Supreme Court of Oklahoma in its decision involving grants of right-of-way through the public domain. The fact that the Choctaw Railway Act did not relate to land in the public domain, nor purport to grant a title *in praesenti,* is not suggested or considered and none of the authorities which would support such fact are considered or cited. Indeed, there is a suspicion of collusion or indifference by the parties as to this point, because none of the authorities contrary to the holding announced, though superior in weight and precisely to the point, are cited. These authorities to the contrary are *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 33 Fed. 900; *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 135 U. S. 641; *United States* v. *Fort Smith & Western Ry. Co.,* 195 Fed. 211; and the opinion of Assistant Attorney General Van Devanter, reported in 27 Land Office Decisions 414. In the light of these the Department's statement in the decision is not entitled to weight as a precedent,

and it would seem clear that, if they had been presented to and considered by the Department, its statement on this point would have been different.

The statement as made may be explained by the fact that the question of the character of title the railroad company took under the Choctaw Railway Act was not really involved in the issue presented in that land office case, and the holding thereon is *obiter*. The only thing necessary to to determine in respect of the character of the railroad company's title was that it did not have an absolute fee simple, but only an easement or limited fee in the surface. This would have been true whether its title was acquired under the Choctaw Railway Act as a grant *in praesenti*, or under the general railroad right-of-way act of March 3, 1875, or by condemnation and purchase. The question for decision was not how the railroad company got its easement or limited fee, but who owned the underlying servient estate or reversionary right, which, so it was held, included the mineral right. On this point the Department, in our opinion, reached the correct conclusion. But it was wrong in assuming, and the assumption was wholly unnecessary to the conclusion, that the Choctaw Railway Act granted a right-of-way *in praesenti*.

Again it will be observed that the title to the land involved in that decision had an entirely different history from that of the land involved in the instant case. That land is the southwest quarter of Section 34, which lies east of the Santa Fe tracks and which was by executive order withdrawn from settlement prior to the Opening and on April 20, 1889, and made a Military Reservation. The title

to it never passed to any private individual and no private rights of any sort ever attached thereto until it was conveyed by Act of Congress of August 8, 1894, to the City of Oklahoma City, in trust for its public schools. It never was patented, filed on or settled on by a private individual. The railroad company was suffered by the United States, without objection, and there was no one else who could object, to construct its road across this quarter section. Whether this was done under authority of the Choctaw Act, or the general railroad right of way act of March 3, 1875, or merely by sufferance on the part of the United States, does not appear and is not material. The Act of Congress of August 8, 1894, transferred the title of the United States to all of the quarter section except the railroad's right of way and station grounds and other minor reservations.

The Department's decision holds that this grant operated to convey the underlying title or servient estate of the United States in the land occupied for railroad purposes. In this regard the decision is in harmony with the contentions of the petitioners in the instant cases. One of their alternative contentions is that even assuming, but not admitting, that the railroad company took a title vesting *in praesenti* to a right-of-way, still the underlying servient estate or reversionary right therein passed by patent from the United States to the townsite trustees for the townsite of Oklahoma City, and by trustees deed to the ancestors of the petitioners. This is the same conclusion arrived at in the land office decision and we think it is correct.

In this regard the only distinction between the claims

of title to the servient estate or reversionary right in the railroad right-of-way east of the Santa Fe tracks and that west of them, is that in respect of the land east of them title was conveyed to the City, not by patent, but by a special Act of Congress, while in respect of the land west of them, being that involved in the instant cases, title was conveyed from the United States to those under whom petitioners claim by patent. It is held in the Land Office Decision cited that Congress could convey by special act the servient estate or reversionary right. If this be true, does it not necessarily follow, both logically and legally, that such servient estate or reversionary right would pass equally as well under the provisions of a general act of Congress, specifying certain terms and conditions under which the Land Department would have authority to issue a patent conveying the land to a private citizen as patentee, when such terms and conditions had been fully complied with and such patent actually issued?

The Department says in the decision:

> "That grant created a possibility of reversion in the Indians, but in as much as it is a matter of public history that the Indian title was extinguished as to the area involved here by Treaty of January 18, 1889, with the Creeks, and the Act of March 1, 1889 (25 Stat. 757), we may assume that the right of reversion passed to the United States."

If by a treaty of cession the right of reversion passed from the Indians to the United States, then why would such right not pass from the United States by its patent to a homesteader?

But petitioners submit that, under the Land Office Decisions themselves, which are not harmonious, the weight of authority is in favor of the contention of the petitioners here. In this connection the case of *W. S. Burch*, 45 L. D. 473, decided September 12, 1916 is cited.

In the *Burch* case the question was as to whether or not a railroad right-of-way across a tract of land should be excepted from the area of said tract to be conveyed by a patent, or whether the patent should convey the entire area subject to the railroad's right of occupation and use of the surface for its right-of-way. The authorities on both sides of the question are discussed fully in the decision. For the convenience of the Court the pertinent parts of this decision, which, as will be observed, is of some length, are reproduced in an appendix hereto.

That decision supports, both on reason and authority, the position that a patent issued in due course by the United States to a tract of land crossed by a railroad right-of-way conveys all the title in the tract which the United States has, and conveys the servient estate or reversionary right underlying the area included in the railroad right-of-way, subject only to the right of occupation thereof by the railroad company for railroad purposes.

Petitioners desire to cite additional authorities in support of the following proposition, which is the "Third Proposition" in their original brief:

> **"Whatever title the railway company may have acquired under the Choctaw Railway Act and by whatever method the same may have been acquired, it took only an easement or limited fee for railroad purposes in the surface, with the underlying fee or reversionary right in the Indian Tribe or in the United States, and this fee or right passed by patent from the United States and by mesne conveyances to petitioners' ancestors." (Original Brief, page 58).**

In respect of private grants, the Courts have taken strong ground that a deed by one owning land abutting on a railroad right-of-way conveys all and whatever right or title the grantor has underlying such right-of-way, unless such conveyance shows an affirmative intention to the contrary.

In the instant case the Oklahoma City townsite, being the southeast quarter of section thirty-three township twelve north, range three west, and the Higgins tract, being the southwest quarter of the same section, are traversed by the right-of-way involved. If conceivably the railroad company could have had title to a right-of-way at or before the time the United States issued its patents to these quarter sections, the patents, being without any exception or reservation on account of such right-of-way (R. 6 and 151), would convey all and whatever title the United States had underlying it.

The following authorities seem to support the foregoing:

Paine v. *Consumers F. & S. Co.*, 71 Fed. 626.
Barker v. *Lashbrook*, 128 Kan. 595, 279 Pac. 12.
Roxana Pet. Corp. v. *Sutter*, 28 Fed. (2d) 159.
Roxana Pet. Corp. v. *Jarvis*, 127 Kan. 365, 273 Pac. 661.
Rio Bravo Oil Co. v. *Weed*, — Tex. —, 50 S. W. (2d) 1080.
Shell Pet. Corp. v. *Hollow*, (10th C. C. A.) 70 Fed. (2d) 811.

In *Paine* v. *Consumers F. & S. Co.*, *supra*, Judge TAFT, in the decision, says:

> "The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of abutting lots, and modern decisions are even more radical in this regard than the older cases."

The foregoing authorities, in conjunction with those cited in petitioners' original brief, tend to support the position that there would be no benefit accruing to the United States from retaining an underlying fee or right subject to a railroad title to the surface in a strip of land a hundred feet wide, extending hundreds of miles through lands which had been patented in their entirety to private individuals, and no reason why the United States should want to retain such underlying fee or right and no reason why a patent of the United States purporting to convey the whole tract should not be construed to convey whatever

right, title and interest the United States might have underlying a railroad right to the surface.

The authorities here cited are suggested for the Court's consideration for whatever weight they may be entitled to on this proposition.

CONCLUSION

In conclusion it is respectfully submitted that upon the record as made and the authorities presented, the judgment and decision of the Supreme Court of Oklahoma and of the District Court of Oklahoma County in said State should be reversed and the causes remanded to said district court with directions to enter judgment for the petitioners.

Respectfully submitted,

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